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I. STATEMENT OF FACTS

On February 29, 2008, the defendant pled guilty to an Information (CP 1) charging him with Possession of Controlled Substance – Heroin. The defendant prepared and submitted to the Court a Statement of Defendant on Plea of Guilty to Non-Sex Offense (CP 8). A copy of that document is attached hereto and by this reference incorporated herein. As part of the Statement of Defendant on Plea of Guilty it indicates on page three of the type of crime that he was pleading guilty to carries with it community custody from nine to twelve months. Also attached to that document was the Offer of Settlement by the State of Washington which recommended the low end of the standard range which was 366 days. The boxes concerning community custody were not checked on the offer that was attached to the Statement of Defendant on Plea of Guilty. Also attached to the Statement of Defendant on Plea of Guilty was a Declaration of Criminal History which, at the time of sentencing, worked out to be thirteen points.

On February 29, 2008, in front of Judge Nichols the defendant entered his Plea of Guilty. The Judge went over with the defendant the nature of the criminal charge and also indicated to him as follows:

The Court: This crime carries with it a maximum term of five years in prison and a \$10,000.00. Based upon your offender score and the standard range or actual confinement is between 12-24 months. In addition to that, you will be subject to community custody as probation, and that can run up to another twelve months, together with certain fines, fees and costs. Do you understand those consequences?

Mr. Mituniewicz: Yes, I do, your Honor.

The Court: Well, the Prosecution has made a recommendation of 366 days. Are you familiar with that recommendation?

Mr. Mituniewicz: Yes, I am, your Honor.

The Court: Do you understand that I do not have to follow that recommendation?

Mr. Mituniewicz: Yes, your Honor.

-(RP 39, L. 18 – 40, L. 8).

After some further discussion with the defendant the Court's asks him:

The Court: ...so, knowing all these rights are being waived, the consequences you face, do you still wish to plead guilty to this charge?

Mr. Mituniewicz: Yes, I do, your Honor.

The Court: Are you making this decision to plead guilty freely and voluntarily?

Mr. Mituniewicz: Yes, I am.

-(RP 40, L. 24 – 41 L. 5)

After the acknowledgment of what he did that makes him guilty of the crime, the Court accepted his plea (RP 41).

The parties then proceed on to sentencing with the State making its recommendation and the defense making a request for some type of

consideration for drug court. (RP 42 – 43). At sentencing was the first time that the defendant raised with the Court that he didn't want community custody because he had always had difficulties on community custody with his probation officers. The defense attorney indicated to the Court that he had explained to his client that this was statutorily mandated and the Court also indicated that it was something that was mandated and if it wasn't in there then the Department of Corrections would require that it be put into the Judgment and Sentence (RP 43 – 44). The Court then sentenced the defendant to the low end of the standard range (even though he had an offender score of 13) and also indicated that community custody was part of his sentence. (RP 46 – 47).

II. RESPONSE TO ASSIGNMENTS OF ERROR

The assignments of error raised by the defendant are claims that the Prosecutor violated the defendant's right to due process by failing to make the agreed sentencing recommendation. Specifically, that, even though the Prosecutor recommended the 366 days, that also the community custody was part of the sentence that the court gave. It is to be noted at the time of the change of plea that the State was recommending the 366 days but made no comment about the community custody. This was something that was brought up by the Court in explaining to the

defendant that this was part of any sentence that was going to be imposed. The defendant made no complaint about this during the time of the change of plea. He made no complaint about it until the time of sentencing. Even then, it was being explained to him that this was part of the sentence. This was being explained to him by his attorney and by the Court.

A defendant may withdraw a guilty plea when based on misinformation regarding the direct consequences of the plea, regardless of whether the actual sentencing range is lower or higher than anticipated. But, where the defendant is clearly informed of the miscalculation before sentencing and does not object or move to withdraw the plea on that basis, the issue is waived on appeal. State v. Mendoza, 157 Wn.2d 582, 584, 591, 141 P.3d 49 (2006).

This is further spelled out in State v. Codiga, 162 Wn.2d 912, 175 P.3d 1082 (2008) where the question of plea agreements and the burden of showing a manifest injustice sufficient to warrant withdrawal of a plea rests with the defendant and that the matter needs to be raised with the trial court prior to sentencing. In footnote number five the Supreme Court analyzes Mendoza as opposed to Codiga:

5. The State also argues that Codiga waived his right to challenge his sentence under the higher offender score by failing to move to withdraw his plea before the

imposition of his sentence. In Mendoza, 157 Wn.2d at 591 – 592, we held that Mendoza had waived his right to withdraw his plea where he failed at sentencing either to object to the new sentencing recommendation or to move to withdraw his plea because the standard range was different than he had expected. In that case, the defendant did not object to the State’s lower sentence recommendation; but in this case, Codiga’s counsel did object to the unexpectedly high offender score and sentencing range. RP (February 8, 2005) at 15. After a series of questions, the trial court did not resolve the objection in Codiga’s favor but nevertheless, defense counsel did object. Id. At 15 – 16. Either a Motion to Withdraw or Objection at sentencing is all that Mendoza requires. Mendoza, 157 Wn.2d at 591 – 592.

-(State v. Codiga, 162 Wn.2d at 930, footnote 5)

In our case, during the time that the Court was going through the Change of Plea with the defendant it is clear that the defendant was informed of the Community Custody range and that this would be part of his sentence. He did not object. In fact, he agreed with the Court on that. Further, before sentencing he did not object or move to withdraw his plea on that basis. In fact, the defense attorney notes it at the time of sentencing hearing that there was a problem with the community custody and this defendant, but it was not in the basis of an objection nor was there any motion to withdraw the plea on that basis. The State submits that the defendant cannot challenge the voluntariness of the plea on appeal.

When a defendant pleads guilty, he waives important constitutional rights. State v. Tourtellotte, 88 Wn.2d 579, 583, 564 P.2d 799 (1977). A

Prosecutor may not undercut the terms of an agreement, explicitly or by conduct evidencing an intent to circumvent the terms of the plea agreement. State v. Sledge, 133 Wn.2d 828, 840, 947 P.2d 1199 (1997). The Appellate Courts view the Prosecutor's actions and comments objectively to determine whether the State has breached a plea agreement. State v. Jerde, 93 Wn. App. 774, 778, 970 P.2d 781 (1999). The State submits, that even though the box was not checked on the offer sent to the defense attorney, nevertheless, the sentencing document that the defendant signed clearly had in it the terms and conditions of community custody as part of the sentence. Further, the trial court explained that to the defendant at the time of plea. Objectively, it was not the State, that was breaching a plea agreement but the Court that was informing the defendant as to the nature and range of the sentence that he could impose. Further, he indicated that he was not bound by any type of agreements that would have been made and further indicated at the time of sentencing, that community custody was going to be part of the sentence. The State submits that the Deputy Prosecutor at the time of the offer and Change of Plea was not violating any of the defendant's rights and was acting in good faith.

Finally, the defendant on appeal is arguing that the Court refused to consider an exceptional term of community custody below the standard

range. However, the documentation clearly demonstrates that he had at least 13 countable points and a criminal history that went back to 1969. There is no showing here that the trial court abused its discretion in giving a standard range sentence. State v. S.M., 100 Wn. App. 401 – 409, 996 P.2d 1111 (2000); State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995).

III. CONCLUSION

The trial court should be affirmed in all respects.

DATED this 1 day of Oct, 2008.

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